* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on :29.4.2015*
Judgment delivered on : 06.5.2015

\+ I.A.Nos.2286/2010, 1460/2014, 5310/2014 in CS(OS) 353/2006
R.S.CHHABRA

..... Plaintiff

Through Mr.Sandeep Sethi, Sr. Advocate with Mr.Chaman Lal Sachdeva, Mr.Preet Pal Singh and Ms.Priyam Mehta, Advocates.

versus

GOPAL KRISHAN KAPOOR

..... Defendant

Through Mr.Pritesh Kapoor, Miss. Radhika Sharma and Ms.Bina Gupta, Advocates.

\+ EX.P. 232/2007 & EX.APPL. (OS) 35/2010
SHRI R.S. CHHABRA

..... Decree Holder

Through Mr.Sandeep Sethi, Sr. Advocate with Mr.Chaman Lal Sachdeva, Mr.Preet Pal Singh and Ms.Priyam Mehta, Advocates.

versus

SHRI GOPAL KRISHAN KAPOOR AND OTHERS

..... Judgement Debtors

Through Ms.Bina Gupta, Mr.Pritesh Kapoor and Miss. Radhika Sharma and, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. These are three applications filed by the judgment debtor.

I.A. No. 2286/2010 (under Order XXIII Rule 3 of the Code)

2 This is an application filed by the judgment debtor under Order XXIII Rule 3 of the Civil Procedure Code, 1908 (hereinafter referred to as the 'Code'); reliance has been placed upon the proviso; submission being that the consent decree passed by the Court on 20.03.2006 in CS (OS) No. 353/2006 was obtained under a mis-representation and fraud; submission of the plaintiff (R.S. Chhabra) in those pleadings that he was a valid assignee of Rajesh Kumar (defendant No. 6 in that suit) was a false and fraudulent averment; there was no valid assignment by defendant No. 6 in favour of the plaintiff. In the instant case, the deed of assignment dated 20.04.2005 was only an agreement which was yet to be followed up by another document and not being a complete deed of assignment and the whole case of the plaintiff being premised on this document and this being fully known to the plaintiff, he is guilty of mis-representation within the meaning of Section 18 of the Indian Contract

Act. The consent decree passed on 20.03.2006 premised on this assignment deed suffering from a mis-representation is a voidable contract and the defendant accordingly seeks setting aside of this decree. His second submission on the agreement dated 20.04.2005 is based on the averments that a person holding a back to back agreement to sell with the original proposed buyer would not be entitled to sue on the first agreement in the absence of a valid and a complete assignment in his favour. There being no complete assignment in favour of the plaintiff, the present suit was not maintainable. On this ground also, the decree dated 20.03.2006 is liable to be set aside. This fact was learnt by the judgment debtors only when defendant No. 6 filed an application before the Division Bench seeking setting aside of the consent decree dated 20.03.2006. Submission being that the dispute between the parties had in fact travelled right up to the Supreme Court and the Apex Court vide its order dated 20.11.2009 had granted liberty to the present applicant/judgment debtor to move an appropriate application under Order XXIII Rule 3 of the Code pursuant to which this present application has been filed. Learned counsel for the applicant has placed reliance upon an extract from the text of "Chitty on Contracts" as also

"Halsbury's Laws of England" to argue as to what is a 'mis-representation'. Submission being that a statement of fact, past or present, which is unfounded and which is known to the plaintiff to be a wrong is a 'mis-representation'. Reliance has also been placed upon the judgment of the Apex Court in (1968) 2 SCR 797 *Ningawwa Vs. Byrappa Shiddappa Hireknrabar and Others* to support this submission. Submission being that where a contract is based on fraud or mis-representation, it is voidable.

3 Reply has been filed opposing the application. It is pointed out that the decree dated 20.03.2006 has attained a finality and as per the version of the applicant/judgment debtor while dismissing the SLP on 20.11.2009, the Supreme Court had refrained from interfering with the orders of the Court below which included the consent decree dated 20.03.2006. Submission being that the application is even otherwise barred by law of limitation; under Article 137 of Schedule I of the Limitation Act, an application seeking setting aside of the decree which is based either on fraud or mis-representation has to be filed within a period of three years which period has to be counted from the date of

knowledge of this fraud or mis-representation. Even as per the case of the applicant, he learnt about this fraud or mis-representation when defendant No. 6 filed an application before the Division Bench on 18.05.2006. The present application filed in December, 2010 is barred by limitation. Attention has been drawn to the memorandum of understanding dated 28.02.2005 executed between the plaintiff and defendant No. 6 wherein Clause 7 gave a specific right of assignment to defendant No. 6. Averment being that on 20.04.2005, there was a valid assignment made by defendant No. 6 in favour of the plaintiff and this fact was also well within the knowledge of the plaintiff as this document dated 20.04.2005had been filed by the plaintiff along with his suit. Even otherwise, in view of the judgment of the Apex Court reported as AIR 2004 SC 348 *Shyam Singh Vs. Daryao Singh (dead) by Lrs and Ors.* even in the absence of any words or expressions in a document where there is prohibition of an assignment or transfer, the implied prohibition cannot be read into such a document. The document dated 20.04.2005 was a valid assignment. This application on all counts is liable to be dismissed.

I.A. No. 1460/2014 (under Section 28 of the Specific Relief Act)

4 This is an application filed by defendants No. 1 to 4 under Section 28 of the Specific Relief Act (hereinafter referred to as the 'said Act'). Submission being that the Court even after passing a decree in a suit for specific performance is not functus officio; the decree being only a preliminary decree; the Court is still in seizen of the matter. Where the timeline laid down by the Court had not been adhered to by the decree holder as is so in the present case and the decree holder having failed to deposit the balance amount in terms of the direction contained in the order of the executing Court dated 31.08.2009 and it being clear that the decree holder in fact did not have the money to deposit the balance sum of Rs.4.20 crores, it is a clear case where equitable consideration should not lie in favour of such a decree holder and the decree dated 20.03.2006 is liable to be set aside. For this proposition he has placed reliance upon 69 (1997) DLT 996 *Parvesh Kumar Gulati Vs. Darshan Singh Gulati*. Reliance has also been placed upon (1999) 4 SCC 702 *V.S. Palanichamy Chettiar Firm Vs. C. Alagappan and Another* and (2009) 8 SCC 766 *Bhupinder Kumar Vs. Angrej Singh*.

5 Reply has been filed opposing the application. It is pointed out that there was no timeline laid down by the Court which was contained in the order dated 20.03.2006. The executing Court in its order dated 31.08.2009 had laid down certain directions about the terms of payment and the obligation on the part of the decree holder to make payment would have arisen only 15 days after the date of execution of the conveyance deed which was to be executed in favour of the judgment debtor. The conveyance deed has not yet been executed in favour of the judgment debtor. This is all because of the fault of the judgment debtor and this is clear from the report of the Local Commissioner (J.K. Aggarwal) who had been appointed by the executing Court vide its order dated 31.08.2009. Attention has been drawn to the three interim reports filed by the Local Commissioner. Submission being that it does not now lie in the mouth of the judgment debtor to press his prayer in terms of Section 28 as the whole fault lies with the judgment debtor. Reliance has been placed upon AIR 1970 SC 546 *Nathulal Vs.Phoolchand* and 2005 (5) ALLMR (SC) 15 *P. D'Souza Vs. Shondrilo Naidu* to support an argument that where it is clear from the documents on record that there were obligations on the part of the defendant to

perform his part of the agreement and when he had not done so, the question of plaintiff's readiness and willing to perform his part of the contract would not arise. Reliance has also been placed upon (1972) 3 SCC 684 *Hungerford Investment Trust Limited (In Voluntary Liquidation) Vs.Haridas Mundhra and Others* to put forward an argument that this Court has a limited power to grant relief under the provisions of Section 28 of the said Act. It is not an unlimited power; it is only where the vendor alleges that the vendee has failed to perform his part of the obligation, is the vendor entitled to get relief which prayer is clearly not available to the applicant in the instant case.

I.A. No. 5310/2014 (under Order 11 Rule 12 of the Code)

6 This third application has been filed by the judgment debtor under Order 11 Rule 12 of the Code. Submission being that the bank statement for the period w.e.f. June, 2009 till date along with income tax returns (for the year 2006-2007) of the decree holder/plaintiff should be called upon by the Court to establish the submission made by the judgment debtor/applicant that the decree holder in fact had no money to comply with the directions contained in the order dated 20.03.2006; the decree

holder not having any funds was the reason why he did not pay the balance sum of Rs.4.20 crore; he is not entitled to any equitable consideation; the decree dated 20.03.2006 is accordingly liable to be set aside.

7 Reply has been filed opposing the aforestated application. Submission is that the application has been filed with a malafide intention and only to delay the proceedings in the Court; the obligation was upon the judgment debtor/applicant who had to comply with the directions contained in the order dated 31.08.2009 (passed by the executing Court) and the obligation on the part of the decree holder to pay the balance amount would have arisen only after the execution of the conveyance deed in favour of the defendant which was not executed in their favour all because of the fault of the judgment debtor. The application even otherwise could only have been filed in a pending suit and admittedly in the instant case, the suit proceedings already stand disposed of in terms of a consent decree dated 20.03.2006.

8 Arguments have been heard on all the aforenoted applications. The following factual matrix emerges:

(i) CS (OS) No. 353/2006 was filed by the plaintiff (R.S. Chhabra) against six defendants of whom defendants No. 1 to 5 were the persons with whom defendant No. 6 had entered into an agreement to sell dated 28.02.2005 qua a property bearing No. 14-B (also known as 14-C), Bazaar Marg, Old Rajender Nagar (hereinafter referred to as the 'suit property). Total consideration was Rs.5.20 crores. In terms of Clause 7 of this agreement, there was a specific stipulation which was to the effect that defendant No. 6 for his bonafide need had the right to assign his rights in favour of a third party.

(ii) Vide a subsequent MOU dated 20.04.2005, defendant No. 6 assigned his right in favour of the plaintiff. This was for consideration of Rs. 1 crore. The plaintiff on the strength of this deed of assignment executed by defendant No. 6 in favour of the plaintiff has filed the present suit. His contention was that he was ready and willing to perform his part of the agreement and was willing to pay the entire balance consideration to the defendants but the defendants were not ready to execute the sale deed in his favour.

(iii) The suit was filed by the plaintiff on 24.02.2006. A decree of specific performance in terms of the agreement to sell dated 28.02.2005 was prayed for.

(iv) Within less than one month of the filing of the suit on 20.03.2006, a compromise was arrived at between the parties. This was a compromise arrived at between the plaintiff and defendants No. 1 to 5; defendant No. 4 was present in person. In terms of this compromise, the decree was passed. The compromise application (I.A. No. 3182/2006) was a part of the decree dated 20.03.2006. The schedule of payments was drawn up. It was agreed that the property which was leasehold would be converted into freehold within a period of 15 days; joint statement of the parties was recorded. The suit was disposed of. Decree-sheet was drawn up.

(v) I.A. No. 6399/2006 was thereafter filed on 18.05.2006 by defendant No. 6 in CS (OS) No. 353/2006 seeking setting aside of the decree dated 20.03.2006.

(vi) I.A.No. 8638/2006 was filed by the plaintiff for direction to defendants No. 1 to 5 to implement the decree dated 20.03.2006.

(vii) These applications were disposed of on 05.02.2008 by a Single Judge of this Court. The Court noted that a separate substantive suit has been filed by defendants No. 1 to 4 i.e. CS (OS) No. 691/2007 seeking setting aside of the decree dated 20.03.2006; these applications where all the respective persons were parties could be decided in that suit; these applications were accordingly disposed of.

(viii) In CS(OS) No.691/2007 filed by defendants No. 1 to 4 (challenging the consent decree dated 20.03.2006) an interim application (I.A. No. 14573/2007) was filed by defendants No. 1 to 4.

(ix) I.A. No.55198/2008 was filed by defendant No. 6 in the same suit i.e. in CS (OS) No. 691/2007.

(x) Both these applications sought interim relief against the consent decree dated 20.03.2006; a stay of the decree had been sought. These applications were dismissed by a single Judge of this Court on 09.04.2009. The statement made by the respective parties that a fraud had been played upon them in obtaining the consent decree dated 20.03.2006 as there appeared to be no valid assignment by defendant No. 6 (Rajesh Kumar) in favour of the plaintiff was negatived.

(xi) Appeals were filed separately by defendants No. 1 to 4 and defendant No. 6 respectively. The Division Bench on 27.07.2009 dismissed the appeal of defendant No. 6 (Rajesh Kumar) noting the submissions made by him that the decree dated 20.03.2006 is liable to be set aside as it is vitiated by fraud is incorrect. It was agreed that the balance sum of Rs. 20 lacs would be paid by the plaintiff to defendant No. 6 which was thereafter paid before the Single Judge on 23.08.2012.

(xii) On 20.08.2009, the Division Bench dismissed the appeal filed by defendants No. 1 to 4 on the same premise. This order was passed against the order of the Single Judge dated 09.04.2009 (in CS (OS) No.691/2007). The Division Bench on 20.08.2009 reiterated that even if a proposition is pressed that a party whose consent to a compromise has been obtained by fraud yet in the factual matrix of the instant case, no fraud appears to have been played upon defendants No. 1 to 5; no prima-facie case had been made out in their favour. The Division Bench noted that defendant No. 6/Rajesh Kumar had already entered into an agreement dated 20.04.2005 with the plaintiff (R.S. Chhbra) who had paid a sum of Rs. 1 crore to Rajesh Kumar; the possession of the suit

property was continuously being enjoyed by defendants No. 1 to 4. Relief of injunction was not available to the parties. The Division Bench dismissed this appeal.

(xiii) The matter did not rest here. Both defendants No. 1 to 5 and defendant No. 6 filed separate Special Leave Petitions before the Supreme Court.

(xiv) The Supreme Court on 20.11.2009 passed separate orders in the two separate SLPs against the orders of the Division Bench (dated 27.07.2009 and 20.08.2009).

9 The orders passed by the Apex Court on the SLP of defendants No. 1 to 5 reads herein as under:-

"We find no reason to interfere. Special leave petition is dismissed. However, this will not come in the way of the petitioner challenging the order dated 5.2.2008, whereby the petitioner's application under Order 23 Rule 3 (proviso) CPC was dismissed, in accordance with law."

10 The Supreme Court reiterated that it had no reason to interfere with the order passed by the Division Bench. The petitioner was however not precluded from challenging the order dated 05.02.2008

wherein his application under Order XXIII Rule 3 of the Code was dismissed. I.A. No. 2286/2010 was thereafter filed.

11 The argument of the learned counsel for the applicant in all the aforenoted applications is that the compromise was largely on the ground of misrepresentation and fraud. Attention has been drawn to the assignment deed dated 20.04.2005. Submission being that this was not a valid assignment; being only an agreement to assign; the whole case of the plaintiff is based on this invalid document; had he not got a valid assignment in his favour, the suit would not be maintainable. The judgment debtor learnt about this fraudulent assignment deed only when defendant No. 6 chose to file an application seeking setting aside of the decree dated 20.03.2006 which was on 18.05.2006. The whole transaction being vitiated by a mis-representation and fraud, it is voidable and liable to be set aside.

12 His second argument is premised on Section 28 of the said Act. Submission being that this Court is not powerless to rescind the contract if the timeline laid down by the Court had not been adhered to, the Court is well within its powers to rescind the contract. Submission being that

the decree for specific performance is in the nature of preliminary decree and the suit is deemed to have been pending in the Court. Section 28 makes it clear that the Court does not lose its jurisdiction even after grant of decree for specific performance; it does not become functus officio where the timeline laid down by the Court had not been adhered to by the plaintiff/decree holder as in the instant case, equitable considerations are not to be considered in his favour; the decree is liable to be rescinded.

13 His third submission (in terms of his application under Order 11 Rule 12 of the CPC) is that the decree holder did not have sufficient funds to make the payment and that is why he did not pay the money to the judgment debtor. This can be deciphered by calling his income tax returns.

14 Needless to state that all these submissions have been refuted.

15 This Court has noted that submissions and counter submissions of the respective parties.

16 Section 28 of the Specific Relief Act reads herein as under:-

"28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court."

17 There is no doubt to the settled legal proposition as submitted by the learned counsel for the plaintiff that even after passing of a decree under the Specific Relief Act, the Court does not become functus officio; it retains its powers and being in the nature of a preliminary decree and where the purchase money has not been paid as per the schedule; the contract may be rescinded on the application made by the vendor/lessor.

18 The factual matrix of each case however has to be examined in its individual context for the application of this legal proposition. In the instant case, the compromise decree was passed on 20.03.2006 . This was a consent decree between the plaintiff and defendants No. 1 to 5 where defendant No. 4 was present. This decree was passed within less than one month from the date of filing of the suit which suit had been filed by the plaintiff on 24.02.2005. This suit was premised on a deed of assignment dated 20.04.2005 executed by defendant No. 6 (Rajesh Kumar) in favour of the plaintiff. The rights of the plaintiff had emanated from this assignment deed. Not happy with this consent

decree, defendant No. 6/Rajesh Kumar moved an application seeking setting aside of this consent decree. So also defendants No. 1 to 5. They also filed a separate application seeking setting aside of the consent decree dated 20.03.2006. These applications were disposed of by the learned Single Judge on 05.02.2008. The Single Judge had noted that a separate substantive suit i.e. CS (OS) No.691/2007 has been filed by defendants No. 1 to 4 seeking the same relief i.e. seeking setting aside of the decree dated 20.03.2006. Accordingly, these applications could be dealt with in the substratum of the said suit.

19 In CS (OS) No. 691/2007, two separate applications (as noted supra) were filed by defendants No. 1 to 5 and defendant No. 6. Both of them sought setting aside of the decree of 20.03.2006. They were both dismissed by a speaking order of the Single Judge dated 09.04.2009. The Single Judge had noted that no prima-facie case is made out in favour of the party to grant them the relief of stay of decree dated 20.03.2006. This was upheld by the Division Bench by two separate orders dated 27.07.2009 and 20.08.2009. At the cost of repetition, the Division Bench had noted that the plea of fraud as set up by the

defendants (that the assignment deed dated 20.04.2005 executed by defendant No. 6 in favour of the plaintiff is vitiated being based on a fraud) is prima-facie not made out. The orders were passed on the two separate appeals filed by defendants No. 1 to 4 and defendant No. 6 respectively.

20 Since the contesting parties before this Court are defendants No. 1 to 4, it would be relevant to extract the order passed by the Division Bench on 20.08.2009 (on the application of defendants No. 1 to 4). It reads herein as under:-

"10. If the Plaintiffs/Appellants were aware of the contents of the Memorandum of Understanding dated 20.4.2005 as is evident from the fact that the original document was annexed to the plaint in CS(OS) No.353/2006 and a copy of the same was filed by them as AnnexureP-2 to the Writ Petition, it cannot be said that a material fact was withheld from them or a fraud was played upon them. Whether the Memorandum of Understanding dated 20.4.2005 executed between Defendant No.1 and Defendant No.2 amounted to assignment of the M.O.U. dated 20.4.2005 in favour of Defendant No.1 or it only gave a right to Defendant No.1 to get it assigned in his favour at a later date is a matter of interpretation of document. If the Plaintiffs/Appellants after considering the Memorandum of Understanding dated 20.4.2005 and consulting their Advocate agreed with the contention of Defendant No.5 that by virtue of Memorandum of Understanding dated 20.4.2005, the earlier M.O.U. dated 28.2.2005 stood assigned in his favour. It cannot be said that a fraud was played upon them by Defendant No.1. There can be a genuine difference of

opinion on the legal interpretation of a document. But since long as the document itself was made available to them, it cannot be said that there was a fraud upon the Plaintiffs/Appellants merely because Defendant No.1 interpreted it to mean as assignment of the first M.O.U. in his favour and the Plaintiffs/Appellants agreed with him and that too after consulting their Advocate. In such circumstances, neither there was any concealment nor any fraud.

11. As noted by us, while dismissing the appeal filed by respondent No. 2, Rajesh Kumar, Clause 7 of the Memorandum of Understanding dated 28th February, 2005 executed between him, on the one hand, and the appellant and late Smt. Sanjogta Kapoor, on the other hand, shows that Respondent No. 2 Shri Rajesh Kumar was specifically granted right to nominate and assign Memorandum of Understanding in favour of any nominee(s) and assignee(s). As further noted by us, since Shri Rajesh Kumar had divested all his rights in favour of Shri R.S. Chhabra (Respondent No. 1, herein). The Memorandum of Understanding dated 20th April, 2005 specifically stipulated that he (Respondent No. 1, Shri R.S. Chhabra) shall be entitled to get the sale deed executed in his favour, balance payment was to be made directly to the sellers and the possession was also to be handed over by them to Shri R.S. Chhabra. After execution of the second Memorandum of Understanding, Respondent No. 2 Shri Rajesh Kumar was not entitled, either in law or in equity, to get the suit property sold to him under the Memorandum of Understanding dated 28th February, 2005. Therefore the appellants having compromised with respondent No. 1, after examining the terms and conditions of Memorandum of Understanding dated 20th April, 2005 and after consulting their advocate, it cannot be said that a fraud was played upon them by respondent No. 1 by claiming that the Memorandum of Understanding dated 28th February, 2005 had been assigned in his favour. Respondent No. 1 may have bonafidely interpreted the Memorandum of Understanding dated 20th April, 2005 to mean that the earlier Memorandum of Understanding dated 28th February, 2005 stood assigned in his favour. But that by itself would not constitute a fraud upon the appellants, particularly, when the

Memorandum of Understanding was very much in the knowledge of the appellants. In fact, we failed to appreciate what difference it would have made to the appellants had the Memorandum of Understanding dated 20th August, 2005, actually assigned the previous Memorandum of Understanding dated 28.2.05 to Respondent No.1, instead of only giving him a right to get the previous Memorandum of Understanding assigned in his favour at a later date. For them what was material was that they had entered into a Memorandum of Understanding with respondent No. 2 Rajesh Kumar on 28th February, 2005 and under that documents they had given special right to him to assign his rights under the Memorandum of Understanding in favour of any nominee or assignee and Respondent No.2, Shri Rajesh Kumar, by signing the Memorandum of Understanding dated 20.4.05 with respondent No.1, has already divested him of all his rights under the MOU dated 28.2.2005. For them what is material is that they are getting agreed consideration from respondent No. 1 and are not committing any breach of the terms and conditions contained in the Memorandum of Understanding executed on 28th February, 2005 between them and Respondent No. 2, Rajesh Kumar. They have nothing to lose by executing the sale deed in favour of Respondent No. 1. It is more so when not only the application filed by Shri Rajesh Kumar for grant of interim injunction against execution of the compromise decree dated 28th March, 2006 passed in CS (OS) No. 353 of 2006 has been dismissed, the appeal filed by him has also been dismissed by this court."

……..

16. Even if we proceed on the proposition that a party whose consent to the compromise resulting in passing of compromise decree was obtained by fraud, is entitled to file a suit for setting aside such a compromise decree, ***we find that in the facts and circumstances of the present case, no fraud actually appears to have been played upon the appellants****. Therefore the appellants have failed to make out a prime facie case in favour of setting aside the compromise decree dated 28th March, 2006."*

21 This order of 20.08.2009 has attained a finality before the Supreme Court (quoted supra). The Supreme Court had categorically stated that there is no reason to interfere with the orders passed by the Courts below. Defendants No. 1 to 5 were however not precluded from seeking setting aside of the order dated 08.02.2005 by moving an application under the provisions of Order XXIII Rule 3 of the Code.

22 Order XXIII Rule 3 of the Code reads herein as under:-

"3. Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter
of the suit: -

Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

23 The Explanation to this Section postulates that a consent decree which has been arrived at between the parties will be treated as non-est and a nullity in law if the consent of the parties has been obtained against the provisions as contained in the Indian Contract Act and ground for vitiation of such a decree would include a mis-representation and fraud. Mis-representation and fraud are defined in Section 18 & Section 19 of the Indian Contract Act respectively. It is on these provisions of the Indian Contract Act that the ground of fraud and mis-representation have been pleaded. Submission being that assignment deed dated 20.04.2005 executed by defendant No. 6 in favour of the plaintiff is in fact a fraud and based on false averments.

24 However what is the mis-representation in the assignment deed has not been disclosed; there is no detail of either the mis-representation or fraud. It is a simplicitor statement unsupported by any further detail; except a vague averment that this document dated 20.04.2005 was only an agreement to assign and not a completed deed of assignment. The assignment deed is a registered document. Defendant No. 6 had assailed this document by filing an application seeking setting aside of this

decree (20.03.2006) on the ground that this assignment deed was not a valid assignment but he had lost this argument right up to the Supreme Court. On 20.11.2009, the Supreme Court had dismissed his appeal.

25 This Court notes with pain that the document dated 20.04.2005 was available with the defendants right from the inception; this document was filed along with the plaint in the year 2006. It was on the basis and premise of this document that the suit was filed. Defendants No. 1 to 5 had entered into a compromise with the plaintiff voluntarily and with their free will which is recorded in the consent decree dated 20.03.2006. No detail of 'fraud' or 'mis-representation' has been pleaded or expressed to the Court. In fact even on a specific query had been put to the learned counsel for the applicant there is hardly any answer. Clauses 2 & 3 of this MOU (dated 20.04.2005) disclose that the first party (i.e. defendant No. 6) agreed by this document to assign all rights in his favour to the second party i.e. the plaintiff. Out of the total consideration of Rs. 1 crore, Rs. 80 lacs was admittedly received by defendant No. 6. The document read as a whole clearly depicts the intent of defendant No. 6 which was to assign all his rights in the property to

defendant No. 6. Reference to the earlier document dated 28.02.2005 executed between defendants No. 1 to 5 & defendant No. 6 by virtue of which defendant No. 6 had acquired his right also finds mention. The MOU dated 20.04.2005 was a complete assignment deed. At the cost of repetition the plea of fraud and misrepresentation set up by the defendants i.e. both by defendant nos.1 and 4 as also defendant no.6 had been rejected right up to the Apex Court.

26 The order dated 31.08.2009 is also relevant. This was an order passed by the executing Court. The executing Court for the first time had in fact laid down the timeline within which the parties were to perform their respective obligations. It would be relevant to extract this part of the order. It reads herein as under:-

"In view of the fact that the suit property is a leasehold property, it will have to be converted to freehold. An application in that regard is stated to be pending in the office of L and DO. Since the Defendants 1 to 5 in the suit are not coming forward to take further steps, the learned Court Commissioner is directed to take the necessary steps in terms of this order (along with a certified copy of the decree) and get the conveyance deed executed in the office of the Land DO in favour of the JDs/ Defendant Nos.1 to 5 within the next two weeks. The balance sale consideration for the purpose of registration of the sale deed shall be deposited in this Court by the DH within a period of 15 days from the date that the conveyance deed is executed in

favour of the JDs.

22. As a next step, within two weeks thereafter, the DH will submit to the learned Court Commissioner the draft sale deed and after finalizing the same the learned Court Commissioner will take steps to have it registered. The DH will be called upon to deposit the stamp duty by the learned Court Commissioner within a period of two weeks. A sum of Rs.20 lakhs which has to be paid by the DH will also be deposited in this Court by the DH within a period of fifteen days from the date of execution of the conveyance deed. Upon such deposits it will be open to the applicant Mr. Rajesh Kumar to file an appropriate application seeking withdrawal of the said amount of Rs. 20 lakhs and the original sellers to file an application for withdrawing the balance sale consideration.

23. The fees of Mr. J.K. Aggarwal, the learned Court Commissioner is fixed at Rs.40,000/- which will be paid by the DH within a period of two weeks from today. Simultaneous with the registration of the sale deed, the learned Court Commissioner will take possession of the suit property and hand it over to the DH. It will be open to the learned Court Commissioner to seek the assistance of the local police, if any, for carrying out the directions aforementioned.

24. With the above directions, the execution petition is disposed of. A certified copy of this order together with certified copy of the decree be delivered forthwith to the Court Commissioner.

27 The executing Court had noted that defendants No. 1 to 5 were not coming forward to take relevant steps. Accordingly, a Court Commissioner (J.K. Aggarwal) had been appointed to get the conveyance deed executed on the application already pending before the L & DO. This was to be done in two weeks. The balance consideration

had to be paid by the plaintiff in favour of the defendants when the conveyance deed would have been executed by the judgment debtor. Till date the conveyance deed has not been executed in favour of the judgment debtor.

28 The report of the Court Commissioner is relevant and speaks volumes of the conduct of the defendants. The Court Commissioner has submitted three interim reports. They are dated 05.10.2009, 18.11.2009 and 12.12.2009. In its report dated 18.11.2009, it had categorically been stated that the Deputy L & DO had addressed a letter to the defendant Krishan Kumar Bakshi asking her to be present before the L & DO with all the requisite documents in order that the conveyance deed could be executed in favour of the party. However, inspite of intimation by the Deputy L & DO to the judgment debtor, they had cared not to appear. In its report, the Court Commissioner has categorically stated that on 12.11.2009, Krishan Kumar Bakshi (defendant no.) had received this communication from the Deputy L & DO and had replied vide her communication dated 16.11.2009 wherein she had stated that since the SLP is pending before the Supreme Court and she had sought a stay of

the execution; the directions of the Court Commissioner be kept in abeyance.

29 Thus admittedly the judgment debtors were aware of the proceedings initiated by the Court Commissioner but they chose deliberately and intentionally to avoid them and not to appear before the Land and DO for the execution of the conveyance deed. The Court Commissioner has filed his last report dated 12.12.2009 bringing all these facts to the knowledge of the Court wherein it was reported that the Deputy L & DO has again asked for the presence of the parties in order that the conveyance deed could be executed in their favour and inspite of notice to their counsel (Ms. Bina Gupta, Advocate), none had appeared for the judgment debtor. Thus the whole premise of argument of the defendants that there is delay on the part of the decree holder in complying with the directions contained in the order dated 31.08.2009 and thus decree is liable to be rescinded without any basis.

30 In view of the aforenoted discussion, this Court is of the view that none of the three applications filed by the applicant are sustainable.

They have been filed only to delay the proceedings. Being malafide each of the application is dismissed with costs quantified at Rs.20,000/- each.

I.A. No.2286/2010 (under Order XXIII Rule 3 of the CPC)

31 The applicant himself is not clear whether it is a case of mis-representation or fraud; till the first two days, the arguments were being presented on 'fraud' and pleadings also spoke of fraud; it is noteworthy to note that the details of the mis-representation or fraud has not been given. This Court has already rejected his plea that the MOU dated 20.04.2005 was only an agreement to assign and not a complete deed of assignment.

32 The consent decree and the plea of fraud/mis-representation (as noted supra) had been set up at various stages of the litigation and right up to the Supreme Court, this plea at all stages had been rejected. The application is also time barred. Limitation for an application of such a nature is three years which period has to be counted from the date when the knowledge of the fraud/mis-representation was known to the party; admittedly in this case, the applicants learnt about the fraud/mis-representation qua the assignment deed when defendant No. 6 filed an

application on 18.05.2006 seeking setting aside of the consent decree dated 20.03.2006. The present application filed in December, 2010 was clearly beyond the period of limitation. On this ground also, the application is also liable to be dismissed.

33 This application is without any merit. It is dismissed.

I.A. No. 1460/2014 (under Section 28 of the Specific Relief Act)

34 The discussion supra evidences that the breaches were all committed by the defendants. In fact the order dated 31.08.2009 passed by the executing Court had noted that the defendants were not cooperating and that is why a Local Commissioner had been appointed. The Local Commissioner in its various reports had detailed the non-cooperative attitude of the defendants and inspite of the defendants being asked to appear before the office of L & DO to get the conveyance deed executed, they failed to do so. The letter dated 16.11. 2009 of Krishna Kumar Bakshi is a clear evidence of this defiant attitude of the defendants. They were at breach on almost every stage of the proceedings. The obligation on the part of the plaintiff to pay the balance consideration of Rs.4.17 crores within 15 days would have

arisen only after the execution of the conveyance deed which at the cost of repetition has not been executed till date.

35 The Apex Court in *Hungerford Investment Trust Limited* (supra) while dealing with the power and jurisdiction of a Court on an application under Section 28 of the said Act had inter-alia noted as under:-

"It may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as for instatement, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase money....

There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself:

(i) He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the un-paid purchase-money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and, if the Other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects....

(ii) He may apply to the Court by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be

ordered: Otherwise, the order will be for rescission in default of completion within a limited time...."

36 The factual matrix of the case discloses that all faults lay on the part of the defendants. The obligation on the part of the plaintiff to pay the balance amount had not arisen as the conveyance deed was not executed in favour of the defendants and this was all for the fault on the part of the defendant. Learned Local Commissioner and the communications exchanged between him and the Deputy L & DO and defendants No. 1 to 5 are all evident of this fact.

37 The defendants are not entitled to any relief on this application. It is dismissed.

I.A. No. 5310/2014 (under Order 11 Rule 12 of the Code)

38 This application has been filed under order 11 Rule 12 of the Code which specifically stipulates that such an application can be entertained only in a pending suit. Even presuming the submission of the learned counsel for the defendants that the suit has not yet been disposed of and even while decreeing the suit of a specific performance, it is only in the nature of a preliminary decree and the Court is yet seized

of the matter; the prayer made in the application is also not liable to be granted to the applicant. The submission of the applicant that the obligation could not be performed by the plaintiff as he did not have the sufficient funds in not a matter to be gone into at this stage as the obligation had to come in hierarchy. The first obligation was on the part of the defendants to get the conveyance deed executed in his favour. It was only thereupon after 15 days of the execution of the conveyance deed in favour of the defendants that the plaintiff was obliged to pay the balance amount. The obligation on the part of the plaintiff had not arisen as the conveyance deed has not been executed till date. The question of asking the plaintiff to file his tax returns and to disclose his bank statement does not arise. This application appears to be malafide. It is dismissed.

39 **Alternate submission**

An alternate submission had also been made by the learned counsel for the applicant. This was to the effect that if this Court is not inclined to pass any favourable order on the three pending applications filed by the applicant, the Court may consider his alternate plea; his

alternate plea being that he is entitled to an enhancement of money compensation as the consent decree was passed in the year 2006 and in the last nine years, the property prices have escalated and the sale price of the property in question which was in the year 2006 fixed at Rs.5.20 crores has now escalated to more than 10 times over. This Court being a Court of equity may in the alternate compensate the applicant.

40 This argument has been opposed. Learned senior counsel for the plaintiff has pointed out that in all these applications which have been filed before this Court, this submission has not been pleaded. This submission has been made orally and being an afterthought and not being part of the pleadings, the applicant is not entitled to any relief on this count. Even otherwise, equitable considerations cannot weigh in favour of a party who himself has been negligent and guilty; it is all because of intentional fault on the part of the applicant/defendant that the conveyance deed had not been executed till date in favour of the applicant; the plaintiff is crying hollow and was running from pillar to post since 20.03.2006 and inspite of the plaintiff having the consent

decree since then; the same has not been implemented; no equitable consideration was in favour of the plaintiff.

45 This Court is of the view that the applicants are also not entitled to this alternate prayer.

46 In AIR 2002 SC 2290 *Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Ors.*, the Apex Court while examining such an alternate plea in a suit for specific performance had off quoted that no party can take advantage of its own wrong. In this context, it had also noted as under:-

"45. It would be seen in none of the above noted cases this Court has laid an absolute rule that the proposed vendee would be required to compensate the proposed vendor for the escalation of price of the land and building during the pendency of the proceeding in Court at different level.

46. The appellant has always been ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own wrong. The appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant.

47. Requiring the appellant to pay further sum of Rs. 40 Lakhs would/may amount of frustrating the agreement itself as the appellant may not be in a position to pay the

sum of Rs. 40 lakhs. Respective counsel for the parties had quoted the figure of a particular sum which could be paid to the appellant in lieu of avoiding the decree of specific performance. The appellant had not made an offer to pay any additional sum over and above the quoted price to sell by way of compensation. It does not indicate the financial position of the appellant to pay the additional sum of Rs. 40 lakhs. With due respect, in my view, it would be unfair to grant the decree of specific performance by one hand and take it back by the other."

47 The applications having being dismissed, the next course is to ensure that the execution of the decree dated 20.03.2006 is properly effected. This Court accordingly deems to think fit to appoint Mr. Vinod Goel, Registrar General of this Court to ensure that the conveyance deed qua the suit property i.e. property bearing No. 14-B (also known as 14-C), Bazaar Marg, Old Rajender Nagar is executed by the L & DO in favour of the defendants and for this purpose, this Court authorizes the Registrar General to act on behalf of the defendants who have not been cooperating and not appearing before the L & DO which has led to the frustration and non-implementation of the decree dated 20.03.2006. The conversion charges of converting the property from lease hold to freehold are agreed to be borne by the plaintiff. After the conveyance deed has been executed in favour of the defendants, the balance payment

of Rs.4.17 crores shall be made by the plaintiff to the defendants within a period of 15 days.

48 The fee of the Local Commissioner is fixed at Rs.50,000/- to be borne by the decree holder.

49 All applications as also the execution petition stand disposed of in the above terms.

INDERMEET KAUR, J

MAY 06, 2015
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